



SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Section of Environmental Analysis

April 23, 2004

Fritz R. Kahn, Esq.
1920 N Street, NW
8th Floor
Washington, DC 20036-1601

Re: STB Finance Docket 34382, Nevada Central Railroad - Construction and Operation - In Clark, Elko, Eureka, Lander, Nye and White Pine Counties, Nevada

Dear Mr. Kahn:

This letter is in response to your March 29, 2004 letter, as well as a recent telephone conversation that Dave Navecky of my staff and I had with your client, Mr. Robert A. Kemp, President of Nevada Central Railroad (NCRR). Your letter and Mr. Kemp's comments indicate that there is misunderstanding regarding the need for and scope of environmental review by the STB for this case under the National Environmental Policy Act (NEPA) and the Board's environmental rules. Your letter refers to and encloses a copy of the U.S. Department of Energy's (DOE) Final Environmental Impact Statement (EIS) for the Yucca Mountain Repository. In your letter you note that this Final EIS has been "adopted" by NCRR and that additional environmental review by the STB "would appear to be pointless."

Under NEPA, the responsibility for preparing an EIS lies with the Federal agency that is considering a major Federal action. In this case, the proposed major Federal action would be the STB licensing the construction and operation of the new rail lines proposed by NCRR. Therefore, only a Federal agency (not an applicant) can prepare an EIS, or alternatively, only a Federal agency can adopt an EIS prepared by another Federal agency.

Additionally, EIS adoption can only occur if the document meets the standard for an adequate EIS under 40 CFR Part 1500, the Council on Environmental Quality's regulations that implement NEPA, as well as the STB's environmental rules. DOE never intended the Final EIS to satisfy NEPA requirements for rail transportation issues; and therefore, the Final EIS does not meet these standards and cannot be adopted by the STB. The Final EIS focuses on the potential impacts of the Yucca Mountain repository and rail transportation is only peripherally addressed. For example, the Final EIS addresses rail line corridors and not specific rail line alignments. A separate EIS would need to be completed that analyzes and discloses potential impacts associated with specific rail line alignments including but not limited to noise and vibration, air quality, water resources, threatened and endangered species, land use and ownership, and environmental justice.

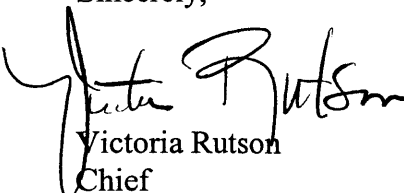
Therefore, it would be necessary for the STB's Section of Environmental Analysis (SEA) to prepare an EIS that would address each specific rail line alignment proposed by NCRR. However, before SEA can begin drafting a *Federal Register* Notice of Intent to Prepare an Environmental Impact Statement (EIS), or Draft Scope of Study for the EIS, we would need NCRR to furnish the data outlined in the attachment to this letter for each proposed rail line alignment. Upon receipt of this data, we will evaluate the data and determine if it is sufficient for SEA to begin drafting the Notice of Intent and Scope of Study.

Please ensure that the data being requested by SEA is provided for each new rail line alignment that is proposed by NCRR. The information we have received to date has conflictingly described the proposal to be as few as one new rail line to as many as three rail lines. SEA cannot proceed until NCRR has clarified and confirmed the scope of its anticipated application to the STB, and has supplied SEA with the requested data for each proposed rail line.

As we also discussed with Mr. Kemp, the environmental review process for a proposal of this magnitude, complexity and level of public controversy cannot be completed in a timely manner with the limited resources of SEA. Therefore, if NCRR proceeds with its proposal, SEA strongly suggests that NCRR consider retaining a third-party contractor that would work under the sole direction and supervision of SEA. I have enclosed a copy of the STB's "Policy Statement on Use of Third-Party Contracting in Preparation of Environmental Documentation." (this document is also available on the STB's website).

If you have any questions, please feel free to contact me or Dave Navecky of my staff at 202-565-1593.

Sincerely,



Victoria Rutson
Chief

Attachments

Policy Statement on Use of Third-Party Contracting
Data Requirements

DATA REQUIRED FOR EACH PROPOSED RAIL LINE
(Sheet 1 of 2)

Mapping

- Generalized map of the preferred alignment (e.g., single 8.5 x 11 or 11 x 17 inch map showing the proposed rail line)
- Detailed maps showing the centerline of the preferred alignment (minimum map scale of approximately 1 inch = 2,000 feet; e.g., U.S. Geological Survey topographic quadrangles)
- Generalized map of alternative alignments considered
- Narrative discussion of why the alternative alignments were dismissed by the railroad from further consideration

Preliminary Design Details

- Length of the line in miles
- Connection point locations with other Nevada Central Railroad lines, and lines of other carriers, as applicable
- Minimum, average and maximum widths of the right-of-way
- Locations of single-track and double-track operations
- Locations and lengths of sidings, as applicable
- Rail line design specifications (e.g., rail car weight class, train length, type of rail [e.g., continuous weld, 136 pound])
- Railyard locations and descriptions of facilities at each, as applicable
- Areas where cut and fill would be needed
- Locations of public at-grade road crossings
- Locations of public grade-separated crossings, as applicable
- Locations of private grade crossings
- Type of safety equipment proposed for each public and private crossing (e.g., crossbucks, flashing lights, gates)
- Bridge and culvert locations and type of construction for each
- Proposed general schedule for construction

ATTACHMENT

DATA REQUIRED FOR EACH PROPOSED RAIL LINE (Sheet 2 of 2)

Rail Operations and Traffic Data (breakdown by first year of operation and provide projections by year for future operations as reasonably foreseeable)

- Expected rail line operation schedule (e.g., 7 days per week)
- Average number of trains per day
- Average length of trains in rail cars
- Number and horsepower of locomotives for typical trains
- Estimated average and maximum operating train speeds
- Location of shippers on the proposed line
- Tabulation of rail cars to be moved annually by the following commodity types
 - Coal
 - Chemicals and allied products
 - Motor vehicles and equipment
 - Farm products
 - Food and kindred products
 - Non-metallic minerals
 - Metals and products
 - Lumber and wood products
 - Pulp, paper and allied products
 - Stone, clay and glass products
 - Petroleum and coke
 - Metallic ores
 - Nonhazardous waste and scrap material
 - Hazardous waste
 - High-level radioactive waste and spent nuclear fuel
 - Other (specify the commodity for each individual commodity type greater than one percent of total annual traffic)

This notice will be included in the bound volumes of the
STB printed reports at a later date.

FR-4915-00-P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Ex Parte No. 585]

AGENCY: Surface Transportation Board

ACTION: Policy Statement On Use Of Third-Party Contracting In Preparation Of
Environmental Documentation

SUMMARY: This policy statement discusses the Surface Transportation Board's
practice of using third-party contractors to aid in preparing environmental documentation
necessary to comply with the requirements of the National Environmental Policy Act of
1969, 42 U.S.C. 4321 *et seq.*, and related environmental laws in Board proceedings.

DATES: This policy statement is effective upon publication, March 19, 2001.

FOR FURTHER INFORMATION CONTACT: Victoria Rutson, (202) 565-1545 or
Evelyn Kitay, (202) 565-1563 [TDD/TYY for the hearing impaired: 1-800-877-8339].

SUPPLEMENTARY INFORMATION: The Surface Transportation Board (Board) often
uses third-party contractors to assist in preparing Environmental Assessments (EAs)¹ or

¹ An EA is a concise public document issued by the agency that contains sufficient information for determining whether to prepare a full Environmental Impact Statement or to make a finding of no significant impact. See Council on Environmental Quality (CEQ), Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, at 40 CFR 1508.9; 49 CFR 1105.4(d).

Environmental Impact Statements (EISs)² to fulfill the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* (NEPA), and related environmental laws in our rail licensing decisions. The public has, on occasion, raised concerns regarding whether an environmental document prepared by the Board’s environmental staff with the assistance of a contractor paid for by a railroad applicant presents an impartial and unbiased analysis. Also, applicants have at times objected to their lack of control over the costs of an environmental analysis in certain proceedings, particularly when the scope of work needed to complete the environmental review in complex cases is more far-reaching than originally contemplated, due to the discovery of unanticipated environmental issues that need to be addressed. Below, we review the requirements of NEPA and the environmental regulations concerning third-party contracting. In addition, we summarize our third-party contracting process, respond to the concerns raised by some regarding our current third-party contracting procedures, and explain why we believe that our approach, although not without problems, is the most appropriate one for this agency.

BACKGROUND

NEPA requires federal agencies “to the fullest extent possible” to consider the environmental consequences “in every recommendation or report on major federal actions

² An EIS is the detailed written statement required by the National Environmental Policy Act for a major federal action significantly affecting the quality of the human environment. See 40 CFR 1508.11; 49 CFR 1105.4(f).

significantly affecting the quality of the human environment.”³ The purpose of NEPA is to focus the attention of the government and the public on the likely environmental consequences of a proposed agency action before it is implemented, in order to minimize or avoid potential negative environmental impacts.⁴ While NEPA requires that we take a hard look at the environmental consequences of our licensing decisions, it does not mandate a particular result. Thus, once the adverse environmental effects of a proposed action have been adequately identified and evaluated, we may conclude that other values outweigh the environmental costs.⁵

Our Section of Environmental Analysis (SEA) assures that the Board meets its responsibilities under NEPA. SEA provides us with an independent environmental review of these proposals for which an environmental review is triggered by NEPA and our implementing regulations at 49 CFR Part 1105 (generally rail line constructions, abandonments, and mergers). SEA prepares an EA or EIS, as appropriate, and provides technical advice and recommendations to the Board on environmental matters.

Third-party contracting is a voluntary arrangement in which the applicant pays for a contractor to assist SEA by developing environmental analyses necessary for

³ 42 U.S.C. 4332(2)(C). CEQ has defined “major federal actions” to include projects regulated or approved by federal agencies. 40 CFR 1508.18.

⁴ Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989).

⁵ See Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989); City of Auburn v. United States, 154 F. 3d 1025, 1031-33 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999) (City of Auburn).

compliance with NEPA and related environmental laws,⁶ under SEA's direction, control, and supervision. Our environmental rules at 49 CFR 1105.10(d) specifically permit the use of third-party contractors, if approved by SEA. The third-party contracting process, discussed below in more detail, has generally worked well in more than 50 Board (and Interstate Commerce Commission) proceedings.⁷

THE BOARD'S THIRD-PARTY CONTRACTING PROCESS

SEA follows certain steps when preparing environmental documents with the aid of third-party contractors. The first step is to inform applicants about the third-party contractor option. As stated above, third-party contracting is a voluntary arrangement. Applicants can choose either (1) to retain a third-party contractor to assist in the preparation of the environmental document or (2) to prepare an environmental (and historic) report on their own, evaluating the potential environmental impacts and any

⁶ See Implementation of Environmental Laws, 7 I.C.C.2d 807, 817 (1991) (Environmental Laws). The government-wide regulations implementing NEPA, promulgated by CEQ, expressly permit the use of third-party contractors in the preparation of an EA or an EIS. 40 CFR 1506.5(c). CEQ regulations provide that agencies using contractors to aid in the preparation of environmental documents will be responsible for selecting the contractors, will provide the contractors with guidance and supervision in the preparation of the document, and will independently evaluate the document before approval. Contractors must sign a disclosure statement prior to beginning work, indicating that they are disinterested parties to the project.

⁷ Most of the concerns that have been raised regarding the third-party contracting process focus on two particularly controversial proceedings involving unique and unanticipated environmental issues that resulted in higher than expected costs associated with the third-party contracting process: STB Finance Docket No. 33388, CSX Corp. -- Control and Operating Leases/Agreements -- Conrail, Inc. (Draft EIS served Dec. 12, 1997; Final EIS served May 22, 1998) (Conrail), and STB Finance Docket No. 33407, Dakota, Minnesota & Eastern Railroad Corp. Construction into the Powder River Basin (Draft EIS served Sept. 27, 2000) (DM&E).

reasonable alternatives to the proposed action, and submit the report with, or prior to, the time they file their project with the Board.⁸ In the former case, the third-party contractor assists in the preparation of the environmental document, working under the direction, supervision, and control of SEA, and the applicant's obligation to submit an environmental and historic report is waived.⁹ In the latter case, SEA prepares the environmental document using the material provided by the applicant in the environmental and historic report as a starting point.

Once an applicant decides to use a third-party contractor to assist in the preparation of the environmental document, the next step in the process is to select a third-party contractor. SEA maintains a list of approved third-party contractors, comprised of individuals and firms with expertise and experience in environmental review of rail or transportation projects.¹⁰ When an applicant expresses an interest in using a third-party contractor, SEA furnishes the applicant a copy of the third-party contractor list. The applicant indicates which contractor from the list it would prefer to use by formally requesting in writing SEA's approval of that contractor.¹¹ SEA decides

⁸ Environmental and historic reports must include the material required by our regulations at 49 CFR 1105.7 and 1105.8.

⁹ See 49 CFR 1105.10(d).

¹⁰ This list was initially derived from responses to a solicitation placed by SEA in the Commerce Business Daily. SEA staff reviewed the responses received for experience in preparing EAs and EISs, and knowledge of and experience in analyzing environmental issues, particularly those related to transportation projects. SEA has periodically updated the third-party contractor list. Currently, there are 48 individuals and firms on the list.

¹¹ Applicants can propose to have a contractor added to the list if the contractor
(continued...)

whether to grant the request and responds to the applicant in writing. SEA's approval is subject to the contractor signing a disclosure statement that it has no financial interest in the outcome of the applicant's proposal.¹² SEA's process allows the applicant to have some input in the selection of the third-party contractor, while enabling SEA to retain ultimate responsibility. Our environmental regulations at 49 CFR 1105.4(j) make it clear that, while the applicant may *participate* in choosing the contractor, "to avoid any impermissible conflict of interest . . . the railroad may not be *responsible* for the selection or control of independent contractors [emphasis supplied]."¹³

After the third-party contractor has signed and returned the disclosure statement to SEA, SEA prepares a Memorandum of Understanding (MOU), which SEA, the applicant,

¹¹(...continued)
furnishes information showing that the contractor has the requisite qualifications.

¹² This practice prevents conflict of interest problems and assures the objectivity of the third-party contractor in the environmental review process. See 40 CFR 1506.5(c) (requiring a contractor disclosure statement); Sierra Club v. Marsh, 714 F. Supp. 539, 553 (D. Me. 1989), quoting CEQ guidance for implementing NEPA, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (1981) (Forty Questions), 46 Fed. Reg. at 18031 (this conflict of interest regulation is intended to preserve the "objectivity and integrity of the NEPA process").

¹³ See also 40 CFR 1506.5(c) ("It is the intent of these regulations that the contractor be chosen solely by the lead agency . . . to avoid any conflict of interest."); Forty Questions, Question 16 ("the agency must select the consulting firm, even though the applicant pays for the cost of preparing the EIS . . . [T]he applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c)"). There have been few challenges to the third-party contracting process. In Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 202 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991), however, the court concluded that the agency "was obliged to pick a contractor itself, and not to delegate the responsibility." The court rejected an agency's claim that its concurrence in the applicant's choice of the contractor was sufficient.

and the third-party contractor must all sign. The MOU outlines the conditions and procedures each party must follow in preparing the environmental document. Under the MOU, the applicant's primary responsibility is to pay for the contractor's services; the contractor's primary responsibility is to assist SEA in preparing the environmental document as SEA directs; and SEA's primary responsibility is to supervise and direct the contractor's work. The MOU provides that the applicant will not attempt to improperly influence the contractor's work, and that the contractor will cooperate fully with SEA. The MOU clarifies that SEA, not the applicant, is in control of the preparation of the environmental analysis, even though the applicant is paying the contractor's bills. The specific responsibilities of SEA, the applicant, and the third-party contractor detailed in a typical MOU are set forth below.

(a) *SEA's Responsibilities.* While the exact language of an MOU will depend on the facts and circumstances of the particular case, each MOU explains that SEA is ultimately responsible for the preparation of the appropriate environmental document, and that SEA will furnish guidance on the environmental analysis, participate in the preparation of the environmental document, independently evaluate the environmental document and add its expertise through review and revision, if necessary.

(b) *The Contractor's Responsibilities.* Each MOU makes clear that the contractor shall provide: environmental expertise; a good working knowledge of NEPA and related environmental laws and regulations; the capability to perform appropriate environmental impact analyses; representatives to attend meetings; the ability to prepare thorough,

readable, technically sound, and informative environmental documentation, as well as related charts, maps, and diagrams; and expertise in data management.

Every MOU states that the contractor may engage subcontractors to perform work on the project, but that all work performed by subcontractors will also be under the direction, control, supervision, and final approval of SEA. MOUs also typically require the contractor to perform work in a “timely, responsive, satisfactory, and cost-effective manner...”

(c) *The Applicant's Responsibilities.* Each MOU states that the applicant is responsible for all costs of the third-party contractor, including administrative and clerical costs associated with preparation and production of environmental documents.

The final step before beginning preparation of the environmental document is the development of a Work Plan that describes the work to be performed by the contractor, sets forth a proposed schedule for completing the work, names the individual members of the contractor's staff who will be primarily responsible for the project, and outlines environmental tasks that will need to be performed for the project known to date (for example, preparation of a biological assessment under the Endangered Species Act, 16 U.S.C 1531 *et seq.*). The Work Plan is prepared by the third-party contractor, in consultation with SEA and the applicant. SEA has the authority to amend the scope of work and monitors the contractor on a regular basis to ensure that the work is progressing efficiently and cost-effectively. SEA also has the authority to remove the contractor for

cause or approve termination of the contract between the applicant and the contractor.¹⁴ If SEA removes the contractor or approves the termination of the contract, SEA works to replace the contractor with another qualified contractor as soon as practicable.

Once all of the preliminary matters have been settled, SEA and the contractor begin working together to prepare the environmental document under SEA's direction and control.¹⁵ The preparation of every environmental document includes extensive contact and cooperation between the contractor and SEA. For example, SEA (1) conducts regular informational briefings with the contractor (by meetings and telephone); (2) determines the format of the environmental document and the scope of the environmental analysis; (3) conducts site inspections with the applicant, the contractor, and other environmental experts, as appropriate; (4) works with the contractor to consult with Federal, state, and local agencies, Native American Tribes, members of the public, and other interested parties, as appropriate; (5) reviews, edits, and revises the environmental document; and (6) coordinates and directs the efforts to reach conclusions regarding potential environmental impacts and develop recommended environmental mitigation measures. The process ensures that SEA retains ultimate control over the work product and protects the independent nature of the environmental document and the contractor's work.

¹⁴ In most cases, the applicant and contractor enter into a separate contract detailing general rates to be charged and others costs to be assessed for various services. The agency does not participate in this process.

¹⁵ See 49 CFR 1105.4(j); 49 CFR 1105.10(d); 40 CFR 1506.5(c) (CEQ regulations requiring that the agency "shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents").

Additionally, the extensive public participation that is an integral part of the environmental review process guarantees that the environmental document will reflect multiple points of view and reduces the possibility of one-sided or applicant-biased environmental analyses.¹⁶ SEA and the contractor typically conduct public outreach at the early stages of the environmental analysis, to promote notice of the proposal and to obtain input on potential environmental impacts and issues associated with the project. Under our environmental rules, an opportunity for public review and comment is provided on every EA and Draft EIS.¹⁷ SEA, working with the contractor, then incorporates and responds to the comments in preparing a final EIS or post-EA.¹⁸

Other agencies participate in the environmental review process as well, which adds further checks and balances to the process and makes the environmental documents required by NEPA more comprehensive. One of the first tasks SEA directs a third-party contractor to undertake is the preparation of consultation letters to appropriate Federal, state and local agencies. All agencies are encouraged to participate and submit comments during the Board's environmental review process. Moreover, SEA may request agencies that have jurisdiction under other laws over some aspect of the proposal, or agencies that

¹⁶ See City of Auburn, 154 F.3d at 1032.

¹⁷ See 49 CFR 1105.10(a), (b).

¹⁸ Id.

have “special expertise with respect to any environmental issue,” to participate as “cooperating agencies” in the Board’s environmental review process.¹⁹

In short, our third-party contracting process provides an effective means to prepare an independent, comprehensive environmental analysis that meets the requirements of NEPA and related environmental laws. The contractors function as an extension of SEA’s staff. They work under SEA’s direction to collect and verify environmental information from the railroads, consulting agencies, other interested parties, and the general public; conduct unbiased environmental analysis; develop appropriate environmental criteria and methodologies for analyzing particular environmental issue areas; and prepare environmental documentation and mitigation options.

CONCERNS THAT HAVE BEEN EXPRESSED

At times, members of the public and certain applicants have raised concerns about the Board’s third-party contracting process. The public has questioned whether any environmental document prepared with the assistance of a contractor paid by the railroad constitutes an impartial analysis, and whether the work of a contractor paid by the railroad is influenced by the applicant-railroad. We believe that adequate safeguards exist that ensure the neutrality of the third-party contracting process. As discussed above, SEA remains fully responsible for the contents of the EA or EIS and closely monitors the work

¹⁹ Cooperating agencies typically have their own decisions to make regarding a particular project and tend to adopt the environmental analysis prepared by another agency (known as the lead agency) and base their decision upon it. One environmental document therefore includes information necessary to fulfill the requirements of NEPA and related environmental laws for both the lead and cooperating agencies. 40 CFR 1501.5, 1501.6. The Board may also be invited to participate as a cooperating agency in an environmental analysis for which another Federal agency is the lead.

of the contractor throughout the environmental review process. There is extensive public outreach to ensure public awareness of the proposals before the agency and participation in the process. Also, SEA issues every EA or EIS in draft form for public review and comment and consults with appropriate Federal, state and local agencies. A final environmental document is then prepared responding to the comments, which also are made public.

Applicants' concerns primarily focus on the cost and lack of control over the scope of the environmental review.²⁰ Specifically, certain applicants have complained that the Board's third-party contracting process prohibits them from controlling the scope of work that will be required to complete the environmental analysis, while requiring them to fully fund the contractor's work.

Because the potential environmental impacts of a project cannot always be predicted at the beginning of the environmental review process, particularly in large rail construction cases or major rail mergers such as Conrail, it can be difficult to estimate accurately the amount of work — and consequently, the amount of money — that will be needed to complete the requisite hard look at the environmental consequences of our licensing decisions. At times, the potential environmental impacts associated with a rail proposal initially may appear to be less than what comes to light as the agency and its contractor begin looking more closely at the proposal. Frequently, consultation with Federal, state, and local agencies, as well as input from the public, serves to disclose

²⁰ See the comments of the Norfolk Southern Railway Company filed in response to the notice of proposed rulemaking in STB Ex Parte No. 582 (Sub - No. 1), Major Rail Consolidation Procedures.

additional potential environmental impacts that must be analyzed and, if possible, avoided or mitigated. In fact, one of the objectives of the environmental review process under NEPA is to detect and appropriately analyze all potential environmental impacts, and as potential impacts come to light during the environmental review process, the agency is required to supplement or even rewrite an environmental document as necessary.²¹ Unanticipated public controversy may develop as the public learns more about a proposal, or additional alternatives beyond those that were anticipated when the environmental review was initiated, may be found that need to be considered. In other words, environmental review is a dynamic process that can entail unavoidable delay in completing the environmental analysis that NEPA requires and increased environmental review costs.

As our regulations state, we encourage the use of third-party contractors because they expedite and facilitate the environmental analysis.²² Without the use of third-party contractors, particularly in complex cases such as Conrail and DM&E, the Board would not have the in-house resources to perform a legally sufficient environmental analysis in a timely manner. The Board does not have, and likely will never have, funding available to it to increase its staff sufficiently to make the third-party contractor resources unnecessary.

Moreover, the Board lacks the broad range of in-house technical experts that third-party contractors can tap. Environmental analyses in Board proceedings are becoming increasingly complex, requiring the input of a number of experts in highly technical fields,

²¹ See CEQ 1983 Memorandum, Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34264 (1983).

²² See 49 CFR 1105.10(d); Environmental Laws, 7 I.C.C.2d at 817.

such as atmospheric science and meteorology, anthropology and ethnography, geographic information system (GIS) analysis, acoustical engineering, and environmental justice analysis. Almost all environmental documents prepared by SEA require the input of some experts. However, individual experts are needed only on a periodic basis, as issues requiring their specific area of expertise do not arise in every case before the Board requiring environmental review. Thus, it would be impractical and prohibitively expensive for a small agency such as the Board to employ its own experts in these highly technical areas on a full-time basis.

Furthermore, while third-party contractors, as private businesses, are free to commit their staff resources to as many or as few clients as they wish, the Board, as a government agency, cannot refuse to conduct environmental analyses and produce environmental documents due to limited staff. In order to prepare appropriate environmental documents without the assistance of third-party contractors, the Board would need more resources to hire additional staff with the necessary expertise to undertake highly technical environmental analyses. But again, even if additional staff could be hired, the increased number would doubtless not be sufficient to replace third-party contractor resources, particularly in complex cases. Third-party contractors with access to staff with varied expertise enable SEA to prepare environmental documents and conduct analyses more efficiently, effectively, and in a more timely manner than if SEA were working alone.

Certain applicants have expressed concern about the significant costs that they can incur with the third-party contractor process.²³ However, SEA oversight and review over the environmental review process minimize delay and unnecessary costs as much as possible. As discussed above, for each case in which a third-party contractor is used, a Work Plan is developed that sets forth a proposed schedule for completing the work and outlines the necessary environmental tasks. SEA then monitors the contractors on a regular basis to ensure that the work is progressing as efficiently and cost effectively as possible. Moreover, when other agencies act as cooperating agencies, as in DM&E, duplication is minimized because those agencies are not performing their own analyses independent of the Board's process, which facilitates efficient environmental review and lowers the applicant's ultimate costs. In certain cases, as already noted, significant issues do surface during the environmental review process that were not anticipated at the beginning of the process, which must be evaluated and do increase the costs of the environmental review process using third-party contractors. While these costs cannot be avoided without calling into question the legal sufficiency of the environmental review, SEA oversight again serves to minimize unnecessary costs as much as possible.

We have examined the third-party contractor processes used by other agencies to see if we could improve our process and allow applicants to better control costs without compromising the need to ensure the independent nature of the contractor's environmental analysis. We conclude that our current process, although not without problems, offers the

²³ See Conrail.

best available alternative for preparing the environmental documentation needed to fulfill the Board's NEPA obligations.

Some agencies have policies similar or identical to ours. For example, the Federal Energy Regulatory Commission's (FERC) procedure for third-party contracting is essentially the same as our process.²⁴ After applicants decide to use third-party contractors, they select which contractor they would prefer to use from FERC's list of approved contractors.²⁵ FERC makes the final decision as to whom to hire as the contractor, and then the selected contractor executes a disclosure statement indicating that it has no conflict of interest. The parties then prepare and sign a Memorandum of Agreement, which describes each party's duties. Like the Board, the applicant in proceedings before FERC is responsible for paying the contractor for the preparation of the environmental document and executes a separate contract with the contractor detailing general rates and costs. FERC supervises the contractor's work and retains ultimate responsibility for the finished product.

The third-party contracting process used by the U.S. Environmental Protection Agency (EPA) in the preparation of EISs, outlined at 40 CFR 6.604(g)(3), is also similar to our process in several respects.²⁶ EPA requires the applicant to pay for the contractor's services, while retaining control and supervisory authority over the environmental

²⁴ Information obtained from FERC's internet website: www.ferc.fed.us.

²⁵ FERC indicates that it uses third-party contracting only in the preparation of EISs.

²⁶ EPA, as a matter of practice, does not use third-party contractors in the preparation of EAs.

analysis. Additionally, EPA allows applicants to provide some input as to their choice of contractor, but retains ultimate responsibility for the final selection of the third-party contractor. EPA and the applicant enter into a MOU that governs the third-party contracting arrangement, and the contractor must sign a disclosure statement prior to beginning work. In the MOU, EPA and the applicant also agree upon a general time frame for the completion of various parts of the EIS, and set forth the scope of the EIS in as much detail as possible.²⁷ If EPA determines that additional analysis beyond the scope of the original MOU is needed, the MOU may be amended to cover the additional work at the applicant's expense, or EPA may elect to complete the analysis itself.²⁸ Unlike the Board, EPA has a separate process for contracting directly with consultants to prepare EISs and has funding to pay for the services of these consultants.²⁹

Other agencies either have separate funding for contractors, or they may require applicants to place funds for paying contractors into separate accounts that are subject to oversight by agency officials. For example, the Federal Aviation Administration (FAA) has separate funds to pay contractors who prepare environmental documents for airport development projects; applicants must pay for hiring contractors to prepare environmental

²⁷ Information obtained from a sample "Memorandum of Understanding Between the United States Environmental Protection Agency and _____ for Third Party Environmental Impact Statement Preparation" that EPA provides to interested parties and from informal telephone conversations with EPA staff.

²⁸ Id. See 40 CFR 6.604(g)(1), (2).

²⁹ Information obtained from informal telephone conversations with EPA staff.

documents in other matters.³⁰ Although separate funds or accounts might reduce some of applicants' concerns regarding the costs incurred in the use of third-party contractors in Board proceedings, the process to create and regulate separate third-party contractor funds or accounts would be burdensome and complex for the parties as well as for a small agency like the Board, and would more than likely require the Board to hire a cadre of escrow account managers. Therefore, this idea is not a practical one for the Board.

SUMMARY

We remain open and receptive to suggestions on how to improve our third-party contracting process. But for now, the current process appears to be the most efficient and effective way for the Board to ensure a thorough, adequate, and legally sound environmental review under NEPA and related environmental laws. As discussed above, we believe sufficient safeguards exist to address the public's chief concern – assurance of the objectivity of the environmental review process. To date, most of applicants' concerns relate to experience with a few extremely controversial rail proposals, such as Conrail, involving extensive opposition by communities or other Federal agencies and entities and unique environmental issues that resulted in unanticipated costs associated with the environmental review process. While we understand applicants' concerns in this

³⁰ Information obtained from an FAA notice for revising its procedures for implementing NEPA, 64 Fed. Reg. 55526, 55594-95 (1999). See also 7 CFR 1789 (discussing the Rural Utilities Services's (RUS) practice of using escrow accounts to fund consultants who assist in the preparation of technical documents for applications before the agency). RUS allows the use of consultants to "provide financial, legal, engineering, environmental or other technical advice and services in connection with the review of an Application" (7 CFR 1789.152(a)). Thus, the preparation of environmental analyses appears to be just one of several instances in which RUS uses third-party contracting.

regard, because the NEPA analysis at times involves the discovery of unforeseen environmental impacts that require more analysis than originally contemplated, we see no way to set monetary limits or to accurately forecast total expenditures at the outset of the NEPA process, nor any practical way to further monitor costs throughout the process beyond SEA oversight. And we see no viable alternative to the use of third-party contractors to ensure a legally sufficient environmental review that is timely, given the Board's budget.

NEPA mandates a process rather than a result. In order to respond to new developments, SEA, as well as contractors working under SEA's supervision and applicants, must remain flexible and responsive. We understand that this process may introduce some undesired uncertainty and additional cost into the environmental review process, but NEPA has certain requirements, including thorough, accurate, and ultimately, legally defensible environmental analyses, and the current third-party contractor process is needed to meet those requirements in the most timely and efficient way possible.

We do not seek public comment on this policy statement because we do not propose a new rule or policy here. Rather, we are explaining the Board's existing policy regarding third-party contractors.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

Decided: March 16, 2001.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams

Secretary